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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 OAKLAND DIVISION

11 THE CENTER FOR INVESTIGATIVE
REPORTING AND PATRICK MICHELS,

12 Plaintiffs,

13
14 v.

15 U.S. DEPARTMENT OF HOMELAND
SECURITY,

16 Defendant.
17

Case No. 4:18-CV-02711 DMR

**ADMINISTRATIVE MOTION TO STAY
PROCEEDINGS – CIV. L.R. 7-11
[PROPOSED] ORDER**

18 **I. INTRODUCTION**

19 Pursuant to Civil Local Rule 7-11, defendant respectfully requests a stay of the proceeding in this
20 case pending the Ninth Circuit Court of Appeals’ consideration of the government’s Petition for Panel
21 Rehearing or Rehearing En Banc (“Petition”) in *Rojas v. FAA*, 927 F.3d 1046 (9th Cir. 2019), that was
22 filed on August 1, 2019, *Rojas v. FAA*, No 17-55036, ECF No. 46. In *Rojas*, the Ninth Circuit held that
23 Exemption 5 of the Freedom of Information Act (“FOIA”)¹ (5 U.S.C § 552(a)(4)(B)) only applies to
24 records that the government itself creates and retains without employing a third-party consultant. 927
25 F.3d 1054. In this case, pursuant to Exemption 5, defendant withheld from plaintiffs material prepared
26

27 ¹ Exemption 5 protects from disclosure all “inter-agency or intra-agency” documents that “would
28 not be available by law to a party ... in litigation with the agency.” 5 U.S.C. § 552(b)(5).

by a third-party consultant on behalf of the defendant. *See* ECF Nos. 34, 35. Plaintiffs disagree that the material is exempted from release pursuant to Exemption 5. *See* ECF No. 35. Accordingly, prior to the government's filing its Petition, the parties stipulated, and the Court ordered, a briefing schedule on cross-motions for summary judgment to resolve this issue. *Id.* Because *Rojas* controls whether the material at issue is entitled to Exemption 5 protection, Defendant seeks to stay the proceedings for the limited length of time necessary to afford the Ninth Circuit an opportunity to rule on the government's Petition, and undertake any further proceedings as appropriate. As explained below, to allow this case to proceed, and to decide the parties' cross-motions for summary judgment without waiting to see whether the *Rojas* decision will remain in place, would contradict judicial efficiency and would be prejudicial to the defendant. Therefore, defendant respectfully requests that this Court stay the proceedings in this case pending decision by the Ninth Circuit as to whether it will grant the government's Petition.

II. DISCUSSION

A motion to stay the proceedings requires the weighing of the following factors: "the possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005); *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962) (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). A district court must also consider the length of the proposed stay. *See Yong v. INS*, 208 F.3d 1116, 1119 (9th Cir. 2000).

The circumstances here warrant ordering a stay of the proceedings. It would be most efficient for the Court to exercise its discretion to stay the proceedings for the limited length of time necessary to afford the Ninth Circuit the opportunity to rule on the Petition. *See Landis*, 299 U.S. at 254-55 ("The United States Supreme Court has long held that the 'power to stay proceedings is incidental to the power inherent in every court' to control its own docket 'with economy of time and effort for itself, for counsel, and for litigants.'"). *See also Briggs v. Merck Sharp & Dohme*, 796 F.3d 1038, 1045 (9th Cir. 2015) (district court stayed proceedings pending rehearing en banc in the Ninth Circuit of a different

case involving a related issue); *Ulanday v. Kane*, No. CV07-2101PHX-NVW LOA, 2008 WL 1989792, at *3 (D. Ariz. May 5, 2008) (holding district court briefing in abeyance twice pending the Ninth Circuit’s decision on a petition for rehearing en banc); *Fontes v. Time Warner Cable Inc.*, No. CV14-2060-CAS (CWX), 2015 WL 9272790, at *4 (C.D. Cal. Dec. 17, 2015) (district court stayed the resolution of a case for a second time pending resolution of appellate review of a pertinent FCC ruling.) Prior to the government filing its Petition, in a similar case pending in this District, *ASBL v. U.S. Department of Defense*, the Court ordered the proceedings in abeyance pending the Ninth Circuit’s decision on the government’s filing a Petition for Review and the Ninth Circuit’s review of the Petition. See *ASBL v. U.S. Department of Defense*, No. 3:18-cv-01979 WHA, ECF No. 93.

The Court’s inherent power to stay proceedings includes ordering a stay “pending resolution of independent proceedings which bear upon the case.” *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979). Here, there is no question that resolution of whether the Ninth Circuit will agree to grant the government’s Petition for Review, or to decline and leave *Rojas* in place, is an independent proceeding that bears upon in the instant case: whether third party consultant material developed on behalf of the government is protected by FOIA Exemption 5. Further, where, as here, a stay is requested pending the resolution of another action “a finding that the issues are substantially similar is sufficient to support a stay.” *Manos v. MTC Financial, Inc.*, No. SACV 16-01142-CJC (KESX), 2017 WL 8236291 (citing *Landis*, 299 U.S. at 254); see also *Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1465 (9th Cir.1983) (upholding stay of suit pending a decision on arbitration, where the arbitrable and non-arbitrable counts in the complaint overlapped both factually and legally)

Moreover, staying the proceedings in this case will prevent any judicial inefficiency arising from potentially having to revisit the *Rojas* decision a second time. After the Ninth Circuit has acted on the Petition, the Court, and the parties, will then be able to resolve the case efficiently and without potential risk of legal error as to whether *Rojas* controls in this case. These efficiencies cannot be accomplished if the case were to proceed to motion practice without resolution of the pending Petition.

1 Granting a stay for this limited purpose is also the most equitable approach. Should the material
 2 at issue were ordered released, in light of a decision that could be overturned, would prejudice the
 3 defendant. Release of FOIA protected information is irrevocable: not only would plaintiffs, one of
 4 which is a news agency, have access to FOIA protected information, but they would be free to disclose it
 5 to the general public.

6 Finally, the stay, if granted, will be of limited duration, only for the length of time necessary to
 7 afford the Ninth Circuit the opportunity to rule on the government's Petition. The Ninth Circuit is acting
 8 expeditiously, having already ordered the Plaintiff-Appellant to file a response to the Petition. *Rojas*,
 9 No 17-55036, ECF No. 47. Thus, in these circumstances, the weighing of the controlling factors,
 10 despite any potential delay in the resolution of this case, tips heavily in favor of granting a stay.

11 Respectfully submitted,

12 DAVID L. ANDERSON
 13 United States Attorney

14 Dated: August 13, 2019

By: _____/s/
 GIOCONDA R. MOLINARI
 Assistant United States Attorney

16 **[PROPOSED] ORDER**

17 The proceedings in this case are stayed until the Ninth Circuit Court of Appeals rules on whether
 18 to grant the government's Petition for Panel Rehearing or Rehearing En Banc, and undertake any further
 19 proceedings as appropriate.

20 IT IS SO ORDERED

21 DATED: _____

22 HON. DONNA M. RYU
 23 United States Magistrate Judge